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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No. _____

D. E. MILLER, *Petitioner,*

vs.

E. I. DU PONT DE NEMOURS & COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE SUPREME COURT OF OKLAHOMA.

To the Supreme Court of the United States—

Your petitioner, D. E. Miller, respectfully prays for a writ of certiorari to the Supreme Court of the State of Oklahoma to review a final decision of said court rendered April 1, 1952, in a case styled "D. E. Miller, Plaintiff in Error, *vs.* E. I. duPont de Nemours and Company, a Corporation, Defendant in Error," and numbered 38841; and respecting such proceedings and final decisions, errors committed, and the jurisdiction of this Honorable Court to grant said writ, represents and shows:

I.

Opinion Below.

The decision and opinion of the Supreme Court of the State of Oklahoma (R. 44-57) is reported in 244 P. (2d) 810. The decision and opinion has not yet been published in the official Oklahoma Reports.

Petition for rehearing of said opinion was overruled on May 27, 1952, (R. 57) and the mandate in said case was issued by the Supreme Court of the State of Oklahoma on the 5th day of June, 1952, and said opinion and decision of said court has become final.

II.

Proceedings in Trial Court.

That on March 30, 1949, the petitioner, D. E. Miller, as plaintiff, commenced an action in the District Court of Mayes County, State of Oklahoma, against E. I. duPont de Nemours and Company, a corporation, as defendant for unpaid compensation as an employee under a government contract, alleged to be due as overtime under the provisions of the Federal Eight-Hour Law, and under Executive Order Number 9240, both of which the contractor had agreed to comply with in his contract with the United States (R. 3-6).

The defendants filed a demurrer to the petition (R. 40) alleging (*1*) that the petition failed to constitute a cause of action; and (*2*) that the petition showed on its face that the cause of action was barred by the Statute of Limitations; and (*3*) that the judgment of the District Court of the United States for the Northern District of the State of Oklahoma was an adjudication of all issues contained in plaintiff's petition.

On July 27, 1950, the District Court sustained the demurrer of the defendants and upon plaintiff refusing to plead further, dismissed said cause (R. 40-41), from which order of the court plaintiff made his record for an appeal to the Supreme Court of the State of Oklahoma.

III.

Proceedings in the Supreme Court, State of Oklahoma.

In due time the said D. E. Miller perfected an appeal from the said order and judgment of the District Court of Mayes County, State of Oklahoma, to the Supreme Court of the State of Oklahoma wherein, by consideration of that

court, a decision was rendered on April 1, 1952, (R. 44-57) affirming the judgment of the trial court that said petition did not state a cause of action but reversing the conclusions of the trial court that the cause was barred by the Statute of Limitations and that the judgment of the District Court of the United States for the Northern District of the State of Oklahoma was *res adjudicata* of the issues.

Upon review of the proceedings in the trial court, the Supreme Court of the State of Oklahoma refused to recognize the right of the plaintiff to enforce rights arising out of the Eight-Hour Law; refused to recognize the rights of the plaintiff as a third party beneficiary to enforce the contract between the respondent and the United States concerning hours and rates of pay to be paid employees engaged in performance of said contract and further held that actions arising under the Eight-Hour Law and under the contract were prohibited by the terms and provisions of the Portal-to-Portal Act.

In said opinion the Honorable Supreme Court of the State of Oklahoma apparently became confused between the Eight-Hour Law and the Fair Labor Standards Act and referred to said Acts and Laws interchangeably throughout said opinion, finally concluding that in as much as said petition did not allege a cause of action under the Fair Labor Standards Act that it could not allege a cause of action under the Eight-Hour Law.

The Honorable Supreme Court of the State of Oklahoma completely overlooked the fact that the Portal-to-Portal Act applied only to causes of action arising under the Fair Labor Standards Act, the Bacon-Davis Act, and the Walsh-Healey Public Contract Act, and stated in the opinion that the Portal-to-Portal Act applied to any activity.

The complete opinion of the Supreme Court appears in the transcript of the record from page 44 to page 57. Syllabus 1, 2, 3 and 4 of said opinion being as follows (R. 44-45):

SYLLABUS.

"1. A contract by employers with the United States that the employees would be paid at rate of time and one-half the regular rate for overtime work and that the employers would comply with all federal laws and regulations including the Fair Labor Standards Act and regulations issued thereunder did not entitle employees to compensation irrespective of Fair Labor Standards Act and Portal-to-Portal Act, nor exempt employees from the provisions of the latter act. Portal-to-Portal Act of 1947, Sec. 1, *et seq.*, 29 U. S. C. A., Sec. 251, *et seq.*; Fair Labor Standards Act 1938, Sec. 1, *et seq.*, 29 U. S. C. A., Sec. 201, *et seq.*

"2. Portal-to-Portal Act relieving employers from liability for failure to pay minimum wages or overtime compensation for any activity of an employee prior to May 14, 1947, except an activity compensable by either contract, custom or practice in effect at time of such activity, is a valid exercise of the constitutional powers of Congress. Portal-to-Portal Act, 29 U. S. C. A., Secs. 251, *et seq.*, 252 (a) (1) (d).

"3. The district court was without jurisdiction of employees' action for overtime compensation for time spent in going from means of transportation to premises to place of work and return, and time spent in changing clothes, and bathing as alleged in the complaint, in absence of allegation that any written or oral contract in force between employees and employer provided for payment for such preliminary and postliminary activities. Fair Labor Standards Act of 1938, Sec. 1, *et seq.*, 29 U. S. C. A., Sec. 201, *et seq.*; Portal-to-Portal Act of 1947, Sec. 1, *et seq.*, 2 (a) (1), (d), 29 U. S. C. A., Sec. 251, *et seq.*, 252 (a) (1), (d); Executive Order No. 9240, as amended, 40 U. S. C. A., Sec. 326 note.

"4. The order of the trial court sustaining the defendant's demurrer to the petition of the plaintiff, and dismissing the action, on grounds that the petition did

not state facts upon which plaintiff was entitled to recover was proper."

Statement of Jurisdiction.

In compliance with Rule 38, paragraph 2; and Rule 2, paragraph 1, of the Rules of the Supreme Court of the United States as amended, D. E. Miller, petitioner, submits herewith his statement, particularly disclosing the basis upon which the Supreme Court has jurisdiction to review on writ of certiorari, the decision of the Supreme Court of the State of Oklahoma entered in this cause.

The judgment of the Supreme Court of the State of Oklahoma was entered April 1, 1952. (R. 44) Petitioner's petition for rehearing was timely filed in the Supreme Court of the State of Oklahoma on May 15, 1952, (R. 57) and was denied by said court on May 27, 1952 (R. 58). This petition for writ of certiorari is herewith filed in the Supreme Court of the United States within time extended (R. 59) within three months after said judgment and decision became final. Title 28, U. S. C., Sec. 2101 (c).

The Supreme Court of the State of Oklahoma is the highest court of the State of Oklahoma in which a decision could be had in said action and petitioner has no right of appeal from its said judgment.

There are drawn into question, in this case, laws of the United States and rights and privileges of the plaintiff, specially set up and claimed under said laws. That the Federal questions involved are of substance and have not heretofore been specifically determined by this Court and the decision of the Supreme Court of the State of Oklahoma is probably not in accord with the applicable decisions of this Court.

The Supreme Court of the State of Oklahoma, in sustaining the demurrer to said petition on the ground that said petition did not state a cause of action, denied the specific and timely contention of the plaintiff, that said judg-

ment deprived said plaintiff of a fundamental right, title, and property held and had under the law of the United States generally referred to as the Eight-Hour Law, and under Executive Order Number 9240, and the decisions of the Supreme Court of the United States declaring what activities constitute "work."

V.

Statutory Provisions Believed to Sustain Jurisdiction.

The statutory provision vesting the Supreme Court of the United States with jurisdiction to grant the writ of certiorari in this case is Sec. 237 (b), Chap. 229, 43 Stat. 936, as amended, the material part of which provides:

> "It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * *; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States;"

VI.

The Manner and Way in Which Federal Questions Were Raised.

The petition filed in the trial court specifically pleaded Title 40, paragraphs 321 to 326, commonly referred to as the Eight-Hour Law, and prayed for the benefits due thereunder (R. 3). The suit is further based upon the contract of the United States Government with the respondent (R. 3) agreeing to comply with the Eight-Hour Law as well as with Executive Order 9240 (R. 4).

On October 19, 1949, (R. 7) an amendment was filed to plaintiff's petition containing the proceedings in the orig-

inal cause, wherein the plaintiff again pleaded the Eight-Hour Law (R. 35, 36, 37), Executive Order 9240 (R. 37) and the said amendment specifically disclaimed any relief under the Fair Labor Standards Act, the Walsh-Healey or the Bacon-Davis Act (p. 7, R. 36) and asked judgment only for the additional compensation due them as third party beneficiaries under the contract and as required by the Eight-Hour Law (R. 37).

When the petition in error was filed in the Supreme Court of the State of Oklahoma (R. 57) plaintiff again raised the Federal question by alleging error of the trial court for the reasons that (*a*) the petition stated a cause of action based on the Eight-Hour Law, and (*b*) the petition stated a cause of action based on the third party beneficiary theory of the contract to comply with the Eight-Hour Law and Executive Order 9240.

The interpretation of the Federal Statutes, Executive Order, and rights thereunder are determinative of this action. The decision of the Supreme Court of the State of Oklahoma, on these Federal questions, was necessary to the determination of said cause and no judgment could have been rendered without deciding these Federal questions.

The petition for rehearing filed in the Supreme Court of the State of Oklahoma (R. 57) presents the Federal Statutes and the error of the court in its holdings.

By its judgment, the Supreme Court of the State of Oklahoma denied plaintiff the right to enforce the provisions of the Eight-Hour Law and the contract made for his benefit and erroneously concluded that the Portal-to-Portal Act applied to actions brought under the Eight-Hour Law as well as to those laws specifically named in the act.

Errors.

That there was drawn in question in said cause, rights, privileges and immunities of your petitioner, under the Constitution and Statutes of the United States especially set

up and claimed, and the said decision of the said Supreme Court of the State of Oklahoma, denied your petitioner the rights, privileges and benefits given to him by said statutes.

Your petitioner believes and therefore asserts, that the final decision of the Supreme Court of the State of Oklahoma against the rights, privileges and immunities of your petitioner, under the Constitution and Statutes of the United States, especially set up and claimed in said court, is erroneous in the following particulars, to-wit:

(*a*) In holding, by denying relief, that the activities set out did not constitute "work" as that term is used in the Federal Eight-Hour Law;

(*b*) In holding, by denying relief, that the plaintiff could not maintain an action under authority of the Eight-Hour Law for unpaid overtime compensation;

(*c*) In holding, by denying relief, that the contract between the United States and the respondent was not a third party beneficiary contract, and in denying plaintiff the right to enforce its terms as to wages contracted to be paid;

(*d*) In holding that the Portal-to-Portal Act applied to actions under the Eight-Hour Law, actions under contract to comply with the Eight-Hour Law, and actions to comply with Executive Order No. 9240.

Your petitioner avers that the decision of the Supreme Court of the State of Oklahoma, the highest court of said state, was in every instance against the rights, privileges and immunities so claimed and set up by him in said case.

Accompanying this application, and as a part thereof, is a full and complete certified transcript of the record in said case, and a brief in support thereof.

Your petitioner avers that he has no right to a review of the decision of the Supreme Court of the State of Okla-

homa, except by this Honorable Court upon an order of certiorari.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of Oklahoma in this case, which is entitled in that court: "In the Supreme Court of the State of Oklahoma, D. E. Miller, plaintiff in error, *versus* E. I. duPont de Nemours and Company, a corporation, defendant in error, No. 34841," to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court.

D. E. Miller, *Petitioner,*

By

Jack L. Rorschach,
Vinita, Oklahoma,
Fred W. Martin,
Wagoner, Oklahoma,
Ernest R. Brown,
Pryor, Oklahoma,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI.*

Statement of Propositions.

Proposition One.

The Supreme Court of the United States has jurisdiction to hear this Petition, and to grant the Order of Certiorari.

Proposition Two.

The activities sued for in this action constituted work as that term is used in the Eight-Hour Law, and Executive Order No. 9240.

Proposition Three.

An employee may sue a contractor, under the Eight-Hour Law, for unpaid overtime compensation.

Proposition Four.

The provisions as to wages contained in the contract between the defendant and the United States were placed therein for the use and benefit of the employee, and the employee can enforce the provisions as third party beneficiary.

Proposition Five.

The Portal-to-Portal Act does not apply to actions arising under the Eight-Hour Law, or under contracts to abide by the Eight-Hour Law, or to abide by Executive Order No. 9240.

Introduction and History of Litigation.

On September 11, 1941, the United States of America entered into a written agreement with the respondent for the construction, training of key personnel (optional), and operation of a smokeless powder plant near Chouteau, Oklahoma. Acting under this contract the respondent pro-

ceeded to construct, train key personnel, and operate the plant known as The Oklahoma Ordnance Works.

In the construction and operation of the Oklahoma Ordnance Works, the respondent, hereafter referred to as "defendant," employed several thousand men and women.

After the termination of hostilities, and on December 12, 1945, I. F. Willis and 21 other employees, "for themselves individually, and for the use and benefit of the more than twenty-five thousand employees and former employees of the defendant similarly situated," filed an action in the District Court of Mayes County, Oklahoma, under case No. 7592 (R. 8-11). This case was thereafter removed to the Federal Court. Thereafter and at various times other parties intervened in said action, and on the 13th day of November, 1948, all such parties filed an amendment to the original and all other petitions (R. 19).

On March 30, 1949, the District Court of the United States for the Northern District of the State of Oklahoma sustained a motion to dismiss (R. 38), and said cause was dismissed for lack of jurisdiction.

After the said cause was dismissed by the District Court of the United States for the Northern District of the State of Oklahoma, for lack of jurisdiction, all of the parties to said action refiled their suit in the District Court of Mayes County, Oklahoma, with D. E. Miller filing his action separate from the others as a "pilot case." Therefore while this action covers only the claim of one employee, it actually determines the law applicable to several thousand similar employees whose combined suit is pending on the docket awaiting the determination of this action and a pronouncement of the law applicable to the facts involved.

Having thus briefly set out the history of this litigation the petitioner will proceed with the details of the pleadings, propositions and the law of this action, presenting the propositions in the order in which they naturally appear in the case.

PROPOSITION ONE.

The Supreme Court of the United States has jurisdiction to hear this petition, and to grant order of *certiorari*.

"A state Supreme Court judgment denying a right claimed under the Constitution and the Statutes of the United States was reviewable by federal Supreme Court. Jud. Code, Sec. 237 (b), 28 U. S. C. A., Sec. 344 (b)."

—*Steele* v. *Louisville & N. R. Co.*, 65 S. Ct. 226, 323 U. S. 192, 89 L. ed. 173.

"The Supreme Court would grant certiorari to review a decision involving a federal question of substance not theretofore determined by the Supreme Court. Jud. Code, Sec. 237 (b), 240 (a), 28 U. S. C. A., Sec. 344(a), 347 (a)."

—*Brooklyn Saving Bank* v. *O'Neil*, 65 S. Ct. 895, 324 U. S. 697, 89 L. ed. 1296.

"The Supreme Court will review or independently determine all questions on which a federal right is necessarily dependent."

—*United States* v. *Pink*, 62 S. Ct. 552, 315 U. S. 203, 86 L. ed. 796 (certiorari granted 61 S. Ct. 960, 313 U. S. 553, 85 L. ed. 1516).

"State court's judgment, based on erroneous determination of federal question, will be reversed."

—*Joines* v. *Patterson*, 47 S. Ct. 706, 274 U. S. 544, 71 L. ed. 1194 (certiorari granted 46 S. Ct. 353, 270 U. S. 639, 70 L. ed. 774.)

See United States Supreme Court Rule 38, Par. 2, and Rule 12, Par. 1.

PROPOSITION TWO.

The activities sued for in this action constituted "work," as that term is used in the Eight-Hour Law, and Executive Order No. 9240.

This is an action for unpaid wages. The "rate" of wages is not in dispute, neither is the type of activity in dispute. This cause having been disposed of by demurrer, presents for consideration a state of facts which we assume to be as stated in the petition. These allegations, as to the activity for which compensation is claimed are as follows (R. 4-5):

"* * * that the Oklahoma Ordnance Works was and is located on a large tract of land. The various buildings comprising the plant are scattered over several thousand acres. It is approximately four miles from the front gate to the clock-in alley. From the clock-in alley to some of the buildings is more than two miles. That in performing their work for said defendant in the carrying out of the contract between the United States and the defendant mentioned above, said plaintiff was required to travel great distances over the work area, after entering upon defendant's premises, under the requirement, supervision and control of said defendant. That the travel and preparation upon the premises of said defendant was not for the use and benefit of said employees, but was made necessary by the physical arrangement and operation of said plant. That this travel and preparation was necessary in order for the said defendants to meet the production goals of said defendant, and to enable said defendant to successfully carry out its terms of said contract. Without such walking, traveling and preparation on the part of the employees the production aims of the defendant could not have been achieved.

"The employee's convenience and necessity, moreover, bore no relation whatever to this walking, trav-

eling and preparation. He walked, traveled and prepared for this work after entering upon defendant's premises, solely because he was compelled to do so because of the necessities of the defendant's business. That because of the nature of the defendant's business said employee was required to change clothes after clocking in, and before clocking out. He was also required to bathe with certain chemical soaps, and to wear certain kinds of shoes. All of this was required and controlled by the defendant, on defendant's premises, and was required to be done before and after the actual productive work shift, and after checking in, and before checking out of the plant.

"That in computing the hours each employee worked under said contract, said defendant did not include as 'hours worked,' that time spent in traveling and preparing for work, as set out above.

"That the physical arrangement of said plant above mentioned, required said employee, in complying with the rules, instructions and directions of said defendant, to travel on said premises, before and after actual productive work, and in preparing for work, and changing clothes and bathing after work, a minimum of one hour per day. That this one hour of work each day for which said employees have not been paid, was work in excess of eight hours of work performed by said employee, so each employee has payable to him one and one-half hours' pay for each day he worked at said plant."

The petition also contains a photostatic copy of the take off of the payroll record. (Transcript 137-1/3 to 137-5/3), which shows the number of days worked, rate of pay, time clocked in and clocked out, together with total wages paid. The plaintiff accepts as true the information disclosed on said sheets, but not as to the number of hours worked.

Under the definition of "work" announced by the Supreme Court of the United states, and other courts, the above activities must be considered as "work." When the allegations of the petition set forth are compared with the authorities, it will be seen that the material allegations concerning the activity are copied verbatim from the decisions declaring such activity to be "work."

The Supreme Court of the United States in the case of *Tennessee Coal Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 64 S. Ct. 689, stated the three essential elements of work as follows:

1. Physical or mental exertion, whether burdensome or not;
2. Exertion controlled or required by the employer; and,
3. Exertion pursued necessarily and primarily for the benefit of the employer and his business.

This declaration of the three basic elements of work, as the term is used in Federal Labor Legislation, has been adopted and repeated in many cases, including the following:

Jewel Ridge Co. v. *Local 6167, etc.*, 65 S. Ct. 1063;

Anderson v. *Mt. Clemens Pottery Company*, 66 S. Ct. 1187, 328 U. S. 680;

Ballard v. *Consolidated Steel Corp.*, 61 F. Supp. 996;

Ulle v. *Diamond Alkali Co.*, 10 Labor Cases No. 62813;

Walling, Adm., v. *Anaconda Copper Co.*, 66 F. Supp. 913.

It is true that the above cited cases are actions based on the Fair Labor Standards Act, and not actions based on contracts to comply with the Eight-Hour Law, or Executive Order No. 9240, yet it is obvious that the Supreme Court would not give one definition of "work" in one Federal law, and another definition in another Federal Act. Both the Fair Labor Standards Act and the Eight-Hour Law and the Executive Order No. 9240, are acts to protect

the rights of the laborer, so the same word—"work"—must be given the same meaning in each act.

"To ascertain legislative intent in enactment of a statute, the court must look to other statutes upon the same or related subject, and to old law."

—*Blevins* v. *W. A. Graham Co.*, 72 Okl. 308, 182 Pac. 247.

"To arrive at legislative intent, all other enactments on same subject-matter must be considered."

—*Oklahoma Coal Co.* v. *Atkinson*, 121 Okl. 59, 247 Pac. 366, writ of error dismissed, 47 S. Ct. 241.

"Where identical words are used in the several statutes respecting same purpose and concerning same subject-matter, judicial construction given language of one should not be changed or altered in construction of that language in subsequent statutes."

—*Barnes Foundation* v. *Kelly*, 181 Atl. 267, 314 Pa. 112.

"In interpreting expressions used in statutes, courts may study previous law on subject and other statutes *in pari materia.*"

—*Gallager* v. *Compodonico*, (Cal.) 5 P. (2d) 486.

"Statutes having same object and similar language *held in pari materia and must be construed together.*"

—*State, ex rel. Orrell*, v. *Johnson*, 109 Fla. 263, 147 So. 254.

"Similar expressions in civil and criminal statutes dealing with same general subject should be given uniform construction."

—*Commonwealth* v. *Bates*, 32 S. W. (2d) 334, 235 Ky. 763.

The Supreme Court of the United States in the case of

Anderson v. *Mt. Clemens Pottery Company*, 66 S. Ct. 1187, in discussing the term "work," has this to say:

> "Where the necessities of employer's business compel an employee to walk to work on employer's premises, following the punching of a time clock, and after completion of the day's work to walk back on the premises to the time clock, the employer is required to include in employee's compensable work week the minimum time necessarily spent in walking at an ordinary rate along the most direct route between time clock and place of work, provided that these walks consume a substantial measure of employee's time and effort.
>
> "Where the necessities of employer's business require an employee, after arriving at his place of work, to engage in certain activities preliminary to the commencement of actual productive work—such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches, for lights and machinery, opening windows and assembling and sharpening tools—the employer is required to include in employee's compensable workweek the time spent by him in the preliminary activities, unless such periods are insubstantial and insignificant."

In the body of this case the Supreme Court of the United States goes on to say:

> "Since the statutory work week includes all times during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place, the time spent in these activities must be accorded appropriate compensation."

And again the Supreme Court states:

> "But the time necessarily spent by the employee in walking to work on the employer's premises, following the punching of the time clock, was working time * * *.

Such time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory. Those arrangements in this case compelled the employees to spend an estimated 2 to 12 minutes daily, if not more, in walking on the premises. Without such walking on the part of the employees, the productive aims of the employer could not have been achieved. The employees' convenience and necessity, moreover, bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business. In that respect the walking time differed vitally from the time spent in traveling from worker's homes to the factory. *Dollar* v. *Caddo River Lumber Co.*, 43 F. Supp. 822 (5 Labor Cases, 60,750); *Walling* v. *Peavy-Wilson Lumber Co.*, 49 F. Supp. 846 (6 Labor Cases, 61,561). Cf. *Commissioner* v. *Flowers*, 326 U. S. It follows that the time spent in walking to work on the employer's premises, after the time clocks were punched, involved 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'

"*Tennessee Coal Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 598 (8 Labor Cases, 52,175); *Jewell Ridge Co.* v. *Local No. 6167*, 325 U. S. 161, 164-166 (9 Labor Cases, 51,201). Work of the character must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract."

One Act of Congress, the Eight-Hour Law, required defendant to contract to pay, and to pay "time and one-half for all work in excess of 8 hours in any one calendar day." Another law, the Fair Labor Standards Act, requires employers, under certain conditions to pay time and one-half the basic wage for all hours worked in excess of forty

hours per week. We do not see how it can be argued that the definition and essential elements of the word "work" in the one case would be different from the same word in the other. The term "work" as it appears in Executive Order No. 9240 must also have same meaning as the word is used in the general field of labor regulations and compensation.

The plaintiff in this case claims a right of action against the defendant on either or both of two separate grounds: *First*, because of the Eight-Hour Law, and, *second*, on the basis of the third party beneficiary doctrine, by reason on the contract the defendant had with the United States, wherein the defendant agreed in writing, for a valuable consideration, to "obey and abide by all applicable law, regulations and ordinances and other rules of the United States of America * * *." (Art. VII-F, Special Requirements, par. 2. Contract No. W-ORD-521 DA-W-ORD-8, R. 43, and p. 8, Supp. 4, Contract, Transcript 229 and 159.) "2. The contractor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calender day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics * * *." (Contract, Art I-F-2, R. 42, and also, Art. II-D, R. 42.)

Having shown by Proposition One that the activity involved constituted "work" as that term is used in the law, we next see that the plaintiff had a right to enforce the law and sue for the compensation due under the "Eight-Hour Law."

PROPOSITION THREE.

An employee may sue a contractor, under the Eight-Hour Law, for unpaid overtime compensation.

Section 324 and 325-A, Title 40 of the U. S. C., set forth the maximum hours to be worked, and minimum wages to be paid to laborers and mechanics for overtime on public works. There is no contention that the Oklahoma Ord-

nance Works was not a "Public Works" as contemplated by the Eight-Hour Law.

The present "Eight-Hour Law" (Appendix, p. 53) is composed of three separate acts; the first of which was enacted in 1868 and 1892, the second in 1912, and the third in 1940 (with a war time amendment in 1917).

Under the Act of 1868, the Supreme Court of the United States in the case of the *United States* v. *Martin*, 94 U. S. 400 (1876), held that while the "Eight-Hour Law" prescribed that eight hours was to be considered a day's work, it did not prescribe any overtime rate of pay, and by reason of that fact, the act was merely a directive, and that an employee could not recover against the Government for his overtime pay as there was nothing stated therein governing the rate to be paid.

However, the case of the *United States* v. *Post*, 148 U. S. 125, decided 1893, involved an action by a letter carrier against the Government for overtime pay for hours worked in excess of eight hours per day under the "Eight-Hour Law." The additional factor with respect to the letter carrier was that there was a specific statute with regard to letter carriers as to the rate which was as follows:

> "Hereafter eight hours shall be considered a day's work for letter carriers in city and postal districts connected thereto for which they shall receive the same pay as is now paid for a day's work of a greater number of hours. If any letter carrier employed a greater number of hours per day than eight he shall be paid the same proportion to the salary fixed by law."
>
> —(Act of May 24, 1888, 25 Stat. at L. 157.)

Therefore, the court stated in *United States* v. *Post* (*supra*):

> "The statute was manifestly one for the benefit of the carriers and it does not lie in the mouth of the Government to contend that the employment in question was not extra services and to be paid for as such."

The Supreme Court sustained the judgment of the Court of Claims in favor of Aaron S. Post, the letter carrier.

Furthermore, the case of *Colemen* v. *United States*, 81 Fed. 824, distinguished the case of the *United States* v. *Post* (*supra*) from the *Martin* case in deciding that no overtime pay could be recovered pursuant to the Act of 1868, as follows:

> "The statute under consideration is quite different in its terms from the Act of May 24, 1888, as to mail carriers. The provision of that act is that:
>
> 'Hereafter eight hours shall be considered a day's work for letter carriers in city and postal districts connected thereto for which they shall receive the same pay as is now paid for a day's work of a greater number of hours. If any letter carrier employed a greater number of hours per day than eight he shall be paid in the same proportion to the salary fixed by law.'
>
> "This statute clearly gives the right of compensation to the carrier for the extra time and directs its payment; and it was so decided in *United States* v. *Post*, 148 U. S. 125. The Act of 1868 has no such provision * * * nor does it prescribe the amount of compensation that or any other number of hours' labor. That is clearly decided in *United States* v. *Martin* (*supra*)." (p. 826)

In two other cases, decided under the "Eight-Hour Law" in accordance with the Acts of 1868 and 1898 and of 1912, to-wit: *Swisher* v. *United States*, 57 Ct. of Claims 126, and *Timmonds* v. *United States*, 84 Fed. 933, the Court points out very definitely the differences between a "laborer and mechanic" suing under the "Eight-Hour Law" of 1868 and 1898, and the *United States* v. *Post* (*supra*), in that the latter contained a provision setting forth the rate of overtime pay and stated that the lack of a rate for over-

time pay constrains them to follow the *United States* v. *Martin* case (*supra*).

In *Timmonds* v. *United States* (*supra*) the court stated:

> "It is otherwise with respect to letter carriers because the act with respect to them expressly provides for the extra time in proportion for the salary fixed by law (*U. S.* v. *Post*, 148 U. S. 125) a provision wanting in the act under consideration." (p. 935)

However, in the case at bar, we now have the Act of 1940 (Sec. 325-A, Title 40, U. S. C.) which prescribed the rate of pay to be paid for overtime work under the "Eight-Hour Law" and brings the instant case squarely within the doctrine of the *United States* v. *Post*.

In a recent case the Court of Appeals of the State of New York held that an employee could sue under the Eight-Hour Law. This case was thereafter appealed to the Supreme Court of the United States and reversed on the grounds that the Eight-Hour Law was not applicable to labor performed outside of the United States. The Court of Appeals of the State of New York in *Filardo* v. *Foley Brothers*, 78 N. E. (2) 480, states as Syllabus 1 the following:

> "The Eight-Hour Law, as amended by Section 325a, permits work in excess of eight hours per day under a government contract for public works, provided hours in excess of eight per day are compensated for at one and one-half times the basic rate of pay. Although that section does not expressly authorize employees to sue a contractor for overtime compensation, such authority is implied, since (1) a duty to pay overtime compensation is imposed on the contractor by the law; (2) it was enacted for the benefit and protection of the employees, as well as to permit greater war production; (3) the absence of express authority for employees' suits, such as that contained in the Fair Labor Standards Act, is not controlling since FLSA author-

izes liquidated damages as well as compensation, and (4) decisions rendered under the law, before it was amended to provide for extra work at overtime compensation, are not applicable.

"Accordingly, an employee is entitled to sue a contractor, under the law, for unpaid overtime compensation."

In the body of the *Filardo* case the Court of Appeals discusses the history of the Eight-Hour Law, as follows:

"In 1941, defendants entered into a cost-plus contract with the United States Government to construct roads, buildings and bases in the Near East in connection with our military effort. By a clause in that contract, defendants agreed to 'obey and abide by all applicable laws * * * of the United States.' In effect at that time was the Federal Eight-Hour Law (U. S. Code, Title 40, Pars. 321-326), which in general, after prohibiting work by laborers on government jobs in excess of eight hours a day (Paragraphs 324, 325), went on to provide that such overtime work was to be 'permitted upon compensation' for all hours over eight at not less than one and one-half times the employee's basic rate of pay (Paragraphs 325 a, 326). Some months after the execution of their agreement with the government, defendants, by a contract made in this country, hired plaintiff, a citizen of the United States, as a cook, at a wage of $60.00 a week, on their jobs in Iran and Iraq. Plaintiff went to those countries and there, for seventy-four weeks, during 1942 and 1943, labored frequently for more than eight hours a day. He requested payment for the overtime hours and, when his demands were rejected, brought this action, asserting that he was entitled to overtime pay at the rate specified in the Eight-Hour Law. The jury found that plaintiff had worked 1,172 overtime hours and returned a verdict of $2,492.36, with interest.

"The Appellate Division reversed the judgment and

dismissed the complaint upon the ground that the Federal statute did not give an employee the right to recover compensation for work in excess of eight hours a day even though it prescribed a work day longer than eight hours and rendered employers liable to criminal prosecution if that limit was exceeded. With that determination we disagree; in our opinion, plaintiff—whose status as a 'laborer' within the compass of the statute is not challenged—may recover either upon a cause of action afforded by the Eight-Hour Law or as a third party beneficiary of the primary contract between defendants and the Federal Government.

"Since both of plaintiff's grounds for recovery turn upon the language and purpose of the Eight-Hour Law, it will be useful at the outset to examine its history. It evolved from a statute, first enacted in 1868, which merely declared 'That eight hours shall constitute a day's work for all laborers, workmen and mechanics now employed, by or on behalf of the Government of the United States' (15 U. S. Stat. 77, Ch. 72). As reenacted in 1892 (27 U. S. Stat. 340, Ch. 352), the statute added a criminal sanction, making it a misdemeanor for any agent or officer of the government or any government contractor to intentionally violate the eight-hour limit (present Par. 322). Amendments in 1912 supplied provisions which today appear as Sections 324 and 325 of Title 40 of the United States Code. As noted above, in effect they demanded that, with certain specified exceptions, every contract for public works, made by or for the United States contain a provision that no laborer or mechanic be required or permitted to work more than eight hours a day and that 'every such contract' contain a stipulation for a penalty of $5.00 a day in case the eight-hour limit be violated (Par. 324). In emergencies, however, an employer was privileged to have men work beyond that limit without incurring penalties (Par. 325). In 1917, our entrance in the first World War impending, Congress voted the President

powers to suspend the eight-hour limit on work covered by government contracts in 'case of national emergency,' 'Provided' that premium pay at not less than one and one-half times the regular rate was given employees who worked longer than the basic eight-hour day upon such contracts (39 Stat. 1192, Ch. 180), and those powers are continued in Section 326 of the present statute.

"In June, 1940—after the outbreak of the second World War—when it once again became necessary to accelerate production and expedite defense activities, Congress suspended the eight-hour limitation in defense work (U. S. Code, Title 50, Appendix, paragraph 1155, subd. (b)). A few months later, in September, 1940, the suspending legislation was superseded by the enactment of Section 325 a (U. S. Code, Title 40, Par 325a) and it is upon its construction that decision herein primarily depends. The new provision explicitly recited that 'work in excess of eight hours per day at not less than one and one-half times the basic rate of pay.' With that amendment, the Eight-Hour Law assumed its present content. A government contractor was again subject to prosecution for a misdemeanor (Par. 322) and to payment of liquidated penalties of $5.00 a day (Par. 324) if he employed laborers for longer than eight hours a day.

"While the statute does not in so many words grant to the employee a cause of action if such compensation is not received, it is settled that such remedial legislation is to be given a liberal construction to effectuate its purpose and aim. (See *National Labor Relations Bd.* v. *Hearst Publications*, 322 U. S. 111, 129 (8 Labor Cases) (51,179); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259-260; *Warner* v. *Goltra*, 293 U. S. 155, 158; *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. (2d) 945 (6 Labor Cases) (61,527).) The statute in terms provides that overtime work was to be per-

mitted 'upon compensation' at not less than time and one-half for such overtime work. (Italics supplied.) Manifestly, that language must be read as an affirmative direction that compensation for overtime work shall be paid and may be collected whenever the hours of work exceed the statutory limit. Any doubt on this score is dispelled when one glances at the language of Section 326—not here involved—which applies when the President suspends the operation of the eight-hour limit; it permits such suspension, 'Provided, That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours' work, with overtime rates to be paid for at not less than time and one-half.' That is plainly a mandate to pay extra compensation for overtime work during the period of the law's suspension, and, since Congress could not have intended to deny overtime pay for work performed during the time the law is in effect, while granting it when it is superseded, both sections—325a and 326—should be read alike. So read, the statute differs little from the Letter Carriers Act (25 U. S. Stat. 157, ch. 308), which has been interpreted to bestow a right to sue upon employees within its coverage. (See *United States* v. *Post*, 148 U. S. 124.) There can be little question that the statute was passed for the benefit and protection of the laborer and, in such a case a party who has 'suffered from a disregard and violation of the duty (imposed by statute) has a cause of action for his damages against the one who has disregarded his duty,' even though the statute does not explicitly provide for such a remedy. (*Abounader* v. *Strohmeyer' Arpe Co.*, 243 N. Y. 458, 465; see, also, *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751; *D'Oench, Duhme & Co.*, v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 456-458). With the beneficial purposes of the statute so manifest, if plaintiff may not sue to enforce it, the benefits accorded would indeed be empty and illusory. He would find himself in the position of hav-

ing been given a benefit he is unable to enjoy, a right he is helpless to enforce.

"Analogously, State minimum wage laws have been interpreted to permit suit by an aggrieved employee to recover the wages therein specified, though the statute merely made payment at less than the specified rate criminally punishable and did not expressly grant a right of civil action. (See *McNulty* v. *City of New York*, 238 N. Y. 29; *City of Phoenix* v. *Drinkwater*, 46 Ariz. 470; cf. *Austin* v. *City of New York*, 128 Misc. 382.) In the *Drinkwater* case (*supra*, p. 474) the Arizona court observing that in determining the meaning of a statute courts must consider 'both the evil to be remedied and the result which the legislature desires to reach,' went on to say (p. 475):

> 'The statute, it will be seen, has a twofold purpose. One is to secure to the individual workman a minimum living wage, fixed by law, and the other is to penalize the employer who fails to pay that wage. With both purposes before us, we certainly think that it would be defeating the intent of the legislature, so far as the first is concerned if we were to hold that the very ones whom the law was intended to protect were helpless to secure that protection, and must satisfy themselves with knowing that somebody had gone to jail or paid a fine for violating the law. Such would, indeed, be a Pyrrhic victory for the workman, consoling perhaps to his feelings, but of very little value in giving to him what the law says he has earned and is due him.'

"And so here. If we recognize—as we believe we must—that the Eight-Hour Law sought to elevate labor standards in employment on public works by requiring the employer to pay extra compensation for hours in excess of eight (see *Walling* v. *Patton-Tulley Transp. Co.*, *supra*, p. 949), it would be both unreasonable and

unjust to say that laborer has no claim for such overtime pay. We conclude that such could not have been the legislative purpose.

"Nor do we deem it of controlling significance that this statute is silent, while another, the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, par. 216, subd. (b)) is explicit in declaring that employers who violate that act—in not paying the prescribed minimum wage or overtime compensation—shall be civily liable to the injured employees. That act entitles the employee not only to damages suffered—the specified minimum wage or overtime pay—but also to an additional sum as liquidated damages. Obviously, in such a case, the employee would be in no position to claim such double damages without explicit statutory authorization.

"It is urged that the interpretation which we place on the Eight-Hour Law is precluded by *United States* v. *Martin* (94 U. S. 400). Decision in that case, and in the others which followed it, was rendered at a time when the statute simply announced a desirable work standard and make no mentions of overtime compensation. The addition—in 1940—of the provision for further compensation at a prescribed minimum rate for work in excess of eight hours a day makes is abundantly clear that the statute is now designed to do more than merely declare a desirable policy. If, as contended, the specification of extra pay for overtime was intended only to relieve employers from criminal penalties imposed by other sections for demanding or permitting such work, enactment of Section 325a, requiring premium pay for overtime, would have been unnecessary and superfluous. A few months earlier Congress had suspended the operation of the Eight-Hour Law as to all persons employed on work for the armed forces (U. S. Code, Title 50, Appendix, par. 1155, subd. (b))—undoubtedly embracing the vast majority of gov-

ernment contractors. As to them, the suspension of the law was effective relief from criminal or other penalties for overtime work, and other employers could have been relieved simply by making the provision more inclusive. That being so, the basis for computing wages of workmen on government jobs and permitting longer hours 'upon compensation' for overtime—demonstrates that Congress was intent not only upon relieving employers of penalties, but upon securing extra pay to laborers for longer hours of work."

After the New York Court handed down the decision in the *Filardo* v. *Foley Brothers* case, *supra*, the same question was passed on by the United States District Court for the District of Massachusetts. This court held that a private right of action to enforce the Eight-Hour Law was created when the law was amended, endorsed the *Filardo* v. *Foley Brothers* holding, and announced the law in the syllabus as follows:

"Section 325a of Title 40 of the U. S. Code relaxed the Eight-Hour Law so as to permit work in excess of 8 hours per day by employees of a government contractor provided that he pays for such excess hours overtime compensation at not less than one and one-half times the basic rate of pay. That statute created a right of action in employees for such compensation by implication, since the statute is remedial in nature and is to be liberally construed in aid of those it intended to benefit, and since the right to such compensation is meaningless without the means of enforcing it."

—*Perry Veader, et al., Plaintiffs,* v. *Bay State Dredging and Contracting Company, and United States of America, Defendants,* 15 Labor Cases, No. 64,636.

In the *Veader* case the court recognized that two courts had denied the right to the employee to maintain the ac-

tion for unpaid wages. An examination of these two cases, however, discloses that they are not authority against such contention. The first case mentioned, *Willis* v. *du Pont de Nemours & Company*, United States District Court for the Eastern District of the State of Oklahoma, 48 A. L. C. 658, 14 Labor Cases, 64,429, was not based on the Eight-Hour Law, but was based solely on the written contract. The question of maintaining an action based on the Eight-Hour Law was not presented, as it was not involved, and the declaration of Judge RICE on that question is pure dictum. The court did not have the benefit of briefs or authorities on the question when he made his passing remarks stating he knew of no authority to maintain the action by the employee. The writer of this brief represented the plaintiff Willis and in fairness to Judge RICE wants it known that the question was not presented to him.

The other case referred to in the *Veader* opinion is *Chambers* v. *Florence Construction Co.*, (D. C., Ga.) 12 Labor Cases, 63,624. An examination of this case discloses that the cause was dismissed for lack of jurisdiction, there being no diversity of citizenship, and insufficient jurisdictional amount. This decision merely declares that the Federal Court does not have original jurisdiction to entertain such an action in the absence of these jurisdictional requirements. It was for the same reason that Judge SAVAGE dismissed the original action in this case, and why the cause was refiled in the State court.

One of the latest cases to pass on the right of the employee to sue under the Eight-Hour Law is the case of *Boggs* v. *Kershaw, Butler Engineers, Limited*, (Ala.) 40 So. (2d) 320, wherein the Supreme Court of the State of Alabama stated in syllabus "3" thereof:

> "While Federal Wage and Hour Law does not expressly grant federal contractor's employees causes of action for unpaid overtime compensation thereunder, such remedial legislation must be given liberal construction to effectuate its purpose and aim, and,

when read with statute requiring payment of extra compensation for overtime work during period of law's suspension by President, bestows right on employees within its coverage to sue for such compensation. 40 U. S. C. A. No. 324, 325, 325a, 326."

In the *Boggs* case, *supra*, the court states that the terms of the Eight-Hour Law are as a matter of law written into every contract of employment.

In the *Boggs* case the plaintiff filed a suit based on two counts, the first claiming $700.00 damages under Title 40, U. S. C. A., No. 324 and 325a, (the Eight-Hour Law) for overtime, and Count Two, a common count, claiming $700.00 for work and labor. Amendments were later added, setting up additional counts. The judgment of the lower court went for the defendant, and the plaintiff appealed. The judgment of the lower court was reversed. In the body of the opinion, beginning with the last paragraph on page 322 of the Southern Reporter, the Supreme Court of the State of Alabama discusses this question:

"It is clear from the averments of said counts that count one is predicated on the eight-hour law, * * *

"The trial court it seems, overlooked or ignored the provisions of the Wage and Hour Law, as amended by the Act of September 9, 1940, embodied in Title 40, U. S. C. A. No. 324, 325 and 325a. The provisions of said law pertinent to the case in hand are: 'Every contract made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one

calendar day upon such work. * * *' Title 40, U. S. C. A., No. 324.

"Section 325 embodies the following provision: '* * * *Provided*, That all classes of work which have been, or may be performed by the Government shall, when done by contract, by individuals, firms or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, *be performed in accordance with the terms and provisions of Section 324.* * * *' (Italics supplied.)

"Section 325a provides: '*Notwithstanding any other provisions of law*, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in Sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. * * *' (Effective Sept. 9, 1940, 9 a. m., E.S.T., c. 717, Title III, No. 303, 54 Stat. 884.)

"(1) These statutes enacted by Congress for the protection of mechanics and laborers employed by contractors or constructors in pursuance of a contract between the government and such contractor, in legal effect, writes into every such contract the quoted provisions of these statutes. 12 Amer. Jur., pp. 769, 741, Sec. 240; *Farmers & Merchants' Bank* v. *Federal Reserve Bank*, ... U. S. 649, 43 S. Ct. 651, 67 L. ed. 1157, 30 A. L. R. 635; *Lindsay* v. *Mayor and City Council of Anniston*, 104 Ala. 257, 16 So. 545, 27 L. R. A. 436, 52 Am. St. Rep. 44; *Filardo* v. *Foley Bros., Inc., et al.*, 297 N. Y. 217, 78 N. E. (2d) 480. And as appears in the stipulation of fact, the contract between the defendants and the government contained the following express provision which was written into such contract in pursuance of said statutes:

'The constructor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours in any one calendar day.'

"(2) Under such contracts, and the statutes authorizing them, it is not material that the laborer or mechanic or the defendant be engaged in interstate commerce, or that such overtime would be performed in the prosecution of such interstate commerce, or in connection therewith.

"In *Filardo* v. *Foley Brothers, Inc., et al.*, 297 N. Y. 217, 78 N. E. (2d) 480, 482, decided March 11, 1948, in a very interesting and what seems to us sound interpretation and application of the eight-hour law, the court observed:

"(3) While the statute does not in so many words grant to the employee a cause of action if such compensation is not received, it is settled that such remedial legislation is to be given a liberal construction to effectuate its purpose and aim. See *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 88 L. ed. 1170; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259, 260, 60 S. Ct. 544, 548, 549, 84 L. ed. 732; *Warner* v. *Goltra*, 293 U. S. 155, 158, 55 S. Ct. 46, 47, 79 L. ed. 254; *Walling* v. *Patton-Tulley Transp. Co.*, 6 Cir., 134 F. (2d) 945. The statute in terms provides that overtime work was to be permitted 'upon compensation' at not less than time and one-half for such overtime work. Manifestly, that language must be read as an affirmative direction that compensation for overtime work shall be paid and may

be collected whenever the hours of work exceed the statutory limit. Any doubt on this score is dispelled when one glances at the language of Section 325—not here involved—which applies when the President suspends the operation of the eight-hour limit; it permits such suspension, 'Provided, that wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours' work, with overtime rates to be paid for at not less than time and one-half.' That is plainly a mandate to pay extra compensation for overtime work during the period of the law's suspension, and, since Congress could not have intended to deny overtime pay for work performed during the time the law is in effect, while granting it when it is superseded, both sections—325a and 326—should be read alike. So read, the statute differs little from the Letter Carriers Act, May 24, 1888, 25 U. S. Stat. 157, Ch. 308, which has been interpreted to bestow a right to sue upon employees within its coverage. See *United States* v. *Post*, 148 U. S. 124, 13 S. Ct. 567, 37 L. ed. 392."

It is therefore apparent that this work fell under the provisions of the Eight-Hour Law, and that the plaintiff, as such employee for whose benefit the law was enacted, has a right to sue for the unpaid wage.

Since the statutes require that the provisions of the Eight-Hour Law be included in the written contracts executed by the Government, most cases involving the Eight-Hour Law also involve the question of the effect of the law being included in the written contract. This question is discussed in both *Filardo* v. *Foley Brothers, supra*, and in *Boggs* v. *Kershaw, Butler Engineers, supra.*

In *Filardo* v. *Foley Brothers, supra,* the court puts it this way:

"In any event—and quite a part from the cause of action given by the statute—plaintiff clearly has a right to sue on the basis of the contract between the

defendant and the Federal Government. * * * Suit on a contract may be maintained by a third party beneficiary."

In *Finnan* v. *Elmhurst Contracting Co.*, (N. Y. Sup. Ct.) 199 Misc. 1016, the court approved the right of an employee to sue under the Eight-Hour Law, and denied the application of the Portal-to-Portal Act as a defense on the ground the Portal-to-Portal Act did not apply to causes under the Eight-Hour Law.

PROPOSITION FOUR.

The provisions as to wages contained in the contract between the defendant and the United States were placed therein for the use and benefit of the employee, and the employee can enforce the provisions as third party beneficiary, both as to general wage, and as to Executive Order 9240.

To begin with, we find that the defendant, for a fixed fee (page 18 of the Contract, Transcript 141), agreed to operate the ordnance facility. It is not necessary to compute just how many hundred thousands of dollars or millions of dollars the fixed fee actually amounted to, as there is no dispute about the contract being supported by a "valuable consideration."

As part of its obligations voluntarily entered into and assumed, said defendant agreed to do certain things as regards labor. These provisions are scattered throughout the contract, and include among other things the following:

Article I-F-Labor (page 9, Contract) (Transcript 146):

1. (a) Pay all mechanics and laborers not less often than once a week;

   (b) Pay all mechanics and laborers unconditionally;

   (c) Pay all mechanics and laborers without subsequent deductions or rebates;

(d) Pay the full amount due at the time of payment;

(e) Compute wage rate at proper rate;

(f) Disregard any contractual relationship alleged to exist between contractor, etc., and the laborer;

(g) Post in prominent and easily accessible place at site of work the minimum wage rate determined by Secretary of Labor;

2. (page 10, Contract) (R. 42):

(h) Compensate laborers and mechanics for all hours worked by them in excess of 8 hours in any one calendar day at a rate of not less than one and one-half their basic rate of pay;

(i) Include in all sub-contracts a provision requiring the sub-contractor to pay time and one-half for all hours worked in excess of 8 in any one calendar day;

3. (page 10 of Contract) (Transcript 150):

(j) Secure approval in writing of the Chief of the Construction Division, O. G. M. C. of all wage rates;

4. (k) Permit the United States to withhold from money due the defendant the difference which might be due the laborers and mechanics between the wages actually paid, and the wages which should have been paid;

5. (l) Agree to permit the cancellation of the contract in event laborers and mechanics were not paid the agreed rate of wages, and to permit the Government to complete the contract, and the defendant pay all excess costs incurred thereby;

6. (m) Furnish affidavits to the United States within 7 days after each pay roll period, showing that each laborer and mechanic has been paid the full amount, without deductions, of the amount shown on the pay roll record.

6-B. (page 11 of the Contract) (Transcript 151):

(n) The defendant agreed to comply with all applicable requirements and regulations of the Secretary of Labor issued under authority of the Act of June 13, 1934.

6-C. Contractor agreed to insert in all subcontracts provisions to insure fulfillment of the requirements of said article.

Article II-D, page 13 of the Contract (R. 42):

(o) Contractor agreed to comply with the Eight-Hour Law and to pay time and one-half for all work in excess of 8 hours in any one calendar day;

(p) Contractor agreed to insert provisions in all subcontracts insuring compliance with the Eight-Hour Law.

Article III-D, page 15, Contract (R. 42):

(q) Contractor agreed to pay time and one-half for all work in excess of 8 hours in any one calendar day;

(r) Contractor agreed to insert provisions in all subcontracts insuring compliance with Eight-Hour Law.

Article IV-D, page 19 of Contract (Transcript 159):

(s) Contractor agreed not to employ males under 16 nor females under 18 in the performance of this contract;

(t) Contractor agreed to comply with the provisions of the Eight-Hour Law;

(u) Contractor agrees to maintain sanitary and safe working conditions for employees.

Article VII-F, Contract (R. 43):

(v) Contractor agreed to obey and abide by all applicable laws, regulations and ordinances and other rules of the United States, of the state, territory,

or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

Article VII-H, Contract (Transcript 179):

(w) The contractor agreed not to use any convict labor.

Article VII-J, Contract (Transcript 180):

(x) The contractor agreed to comply with all safety requirements, and take any other necessary measures to reduce and prevent injuries.

Article VII-I, Contract (Transcript 180):

(y) The contractor agreed to maintain Workmen's Compensation Insurance on all employees, and require sub-contractors to do likewise.

Article VII-U, Contract (Transcript 183):

(z) The contractor agreed not to discriminate against laborers or mechanics on account of their race, creed, color or national origin.

Many other provisions appear t rough the contract covering the rights of laborers and mechanics, but it is unnecessary to further burden this brief with such references.

It requires only a casual examination of these various provisions to convince one that they are for the express benefit of the laborer and mechanic. While we are seeking to enforce only one of the terms, and the fact that there are so many provisions for the benefit of the laborer and mechanic (as well as other statutes hereafter referred to), only more clearly discloses the reason for inserting such provisions in the contract.

It will be noticed that the provisions of the contract between the defendant and the United States (see provisions "k" and "l") provide remedies to pursue when the defendant fails to pay the "RATE" of wages required. The Secretary of Labor determined the wage "RATE." The "RATES" had to be approved by the Chief of Construction Division, O. Q. M. (see "J," *supra*), penalties were

provided for not paying the "RATE" of wages, or for paying in excess of the established "RATE." Every provision establishing a remedy or procedure in the contract is in connection with a breach of the provision regarding "RATE" of wages. No provision is contained in the contract for withholding WAGES which have been computed at the established "RATE." The provisions and procedure for withholding and collecting are limited to controversies over "RATES." If plaintiff seems to be repeating at this time he prays the Court's indulgence, because this question of "RATES" as covered by the contract is very important, and the distinction between "WAGES" and "RATES" must be recognized.

Under the contract any question about the "RATES" of wages must be determined as provided in the contract, that is, by the Secretary of Labor. If, for instance, a laborer thought he should have the rate of a carpenter, instead of a carpenter's helper, he would be confined to the procedure set out in the contract. (See *Kutsche & Company* v. *Keith*, 169 Tenn. 399, 88 S. W. (2d) 454.) The courts hold under the terms of this contract that so long as the controversy is one regarding the wage scale, or rate of wages to be paid the employee, that the provisions of the contract are exclusive:

> "The provisions of the Bacon-Davis Act relating to the rate of wages paid to laborers and mechanics employed on public buildings and works constructed under contract with the Government, does not confer jurisdiction on state courts in suits between laborers on such projects and the public works contractor to recover the difference between wages paid to such laborers and wages prescribed in the contract, between the Government and their employer, since under the Act, all such controversies must be determined by the Secretary of Labor."
>
> —*Kelly* v. *Grimshaw, d/b/a W. R. Grimshaw Construction Co.*, 161 Kan. 263, 167 P. (2d) 627, 11 Labor Cases 63,101.

If this were an action to recover a different "RATE" of pay, we would be subject to dismissal for lack of jurisdiction. Throughout this litigation, however, the plaintiff has agreed that the employees were properly classified, and that they were paid the correct "RATE" of wages. We are suing in this case for wages due, none of which have been paid (wages for the unpaid time).

> "The Bacon-Davis Act requiring that certain Government contracts contain a stipulation that there may be withheld from the contractor sums sufficient to pay laborers, etc., 'the difference between the rates of wages received * * * and not refunded to the contractor * * *,' does not authorize the withholding of payments to contractors by the contracting officers and the payment of claims of laborers, etc., by the Comptroller General therefrom where the contractor has failed to pay any amount to such laborers, *as distinguished from a case where payment has been made but at a rate less than that required by the contract.*" (Emphasis ours.)
>
> —Comptroller General's Decisions, 21 Comp. Gen. 197, Labor Law Reporter, Vol. 2, 36,003.

There are no provisions in the contract as to how the employees shall collect for unpaid time, as distinguished from where they have been paid but at a rate less than that required by the contract. Not having any such provisions or procedure specified, we can proceed in this Court.

The plaintiff does not see how it can be seriously argued that the provisions in the written contract between the defendant and the United States requiring the various labor practices, including the payment of overtime and premium wages and compliance with Federal rules, regulations, etc., were not inserted for the benefit of the laborers and mechanics employed under the contract. A study of the various Acts of Congress discloses beyond any doubt that the United States keeps in mind at all times the welfare of the working man. The Fair Labor Standards Act, the Walsh-Healey Act, the Bacon-Davis Act, the labor provisions of the Bank-

ruptcy Act, the labor provisions of the Civil Aeronautics Act of 1938, provisions regarding hours of service of railroad employees (Act of March 4, 1907, as amended by Act of September 3, 1916), Merchant Marine Provisions for 8-hour day (46 U. S. Code, Section 673), proposed child labor amendment to the Constitution of the United States, the labor provisions of the Sugar Act of 1917, the Act of February 25, 1920 (3 U. S. C. [illegible]), the labor provisions of Section 62 of Chapter 3 of Title 45 regarding railroads and motor carriers, labor provisions of the Maritime Act, and other Acts of Congress prohibiting "kick back," discrimination on account of race, color, religion, etc., as well as all rules and regulations issued under authority of the Acts of Congress including requirements that insurance be maintained on the employees, compliance with state inspection laws, etc., leave no doubt in mind that Congress is interested in protecting the rights of the working man.

All of the laws mentioned above are binding on the parties to the contracts, regardless of whether or not they are included therein. However, some of the acts require that the provisions of the particular law be incorporated into, and specifically made a part of the contract between the United States and the contractor. The statutes also provide for fines and punishment of one kind or another for non-compliance.

In the recent case of *H. B. Deal & Co.* v. *Marlin, Judge*, 84 Ark. 561, 193 S. W. (2d) 315, the exact question was involved that we have in this case. The controversy arose out of the construction of the Ozark Ordnance Works. The contractor operated under a cost plus fixed fee contract, almost word for word with the contract in this case. The only difference being as shown by the opinion, the word "constructor" was used in the reported case, while the word "contractor" is used in this case. In all other respects the provisions of the contracts are identical.

The laborers employed in the construction of the Ozark Ordnance Works instituted an action to enforce that pro-

vision in the contract requiring the payment of time and one-half for all over eight hours worked in any one calendar day. The contractor sought a writ of prohibition in the Supreme Court of the State of Arkansas, to prevent the trial court from hearing the suit. The Supreme Court of the State of Arkansas sustained the right of the employees to enforce the contract on the theory that they were third party beneficiaries. The court said:

> "The provisions of a contract between the U. S. Government and a contractor, which requires a contractor to compensate laborers and mechanics engaged in the construction of the project at time and one-half their basic rate of pay for all hours worked by them in excess of eight hours a day, confers upon the laborers and mechanics, as third party beneficiaries, the right to sue the contractor for the recovery of the overtime rates prescribed by the contract."

In the body of this opinion the court further stated:

> "The petitioner entered into a solemn contract with the U. S. Government, where, for a fixed fee of $202,700.00, petitioner agreed to construct the Ozark Ordnance Works and agreed to pay laborers for overtime on the scale of wages fixed by the Government. We have heretofore quoted one of the provisions of the contract. To quote all of the provisions wherein the Government undertook to see that laborers received full wages without subterfuge would unduly extend this opinion. *The Government placed the quoted provision in the contract for the benefit of the workers. They therefore had a right to sue on the contract.*" (Emphasis ours.)

The case of *Filardo* v. *Foley Bros., Inc.*, 78 N. E. (2d) 480, has been discussed under the previous proposition. In addition to holding that the employees had a cause of action under the Eight-Hour Law, the court specifically

held that the contract was for the use and benefit of the employees, and they could enforce it.

The Court will notice in the *Filardo* v. *Foley Bros.* case, (*supra*) the contract required that the contractor, "Obey and abide by all applicable laws * * * of the United States." In this case the contract relied upon contains the identical provision: "Obey and abide by all applicable laws * * * of the United States." (R. 43) (Contract, Article 7-F, Special Requirements, par. 2.)

The contract in this case comprises several parts, and in some of the provisions it is provided in just so many words that the contractor comply with the Eight-Hour Law, while other provisions require compliance with all laws, rules and regulations.

The plaintiff feels that *Filardo* v. *Foley Bros.; H. B. Deal & Company* v. *Marlin, Judge; Boggs* v. *Kershaw Butler Engineers Limited; Finnan* v. *Elmhurst Contracting Company,* and *Veader* v. *Bay State Dredging and Construction Co.,* all heretofore discussed, are absolute authority to sustain a right of action herein on the contract by the plaintiff as a third party beneficiary.

In addition to the contract creating a cause of action in the plaintiff for all wages due for work performed in excess of eight hours a day it also provides a cause of action for the benefit of the employees under Executive Order No. 9240.

On September 9, 1942, the President of the United States promulgated Executive Order 9240 which was amended on September 17, 1942, and became effective October 1, 1942. That order in so far as we are concerned in this law suit provided as follows:

> "Where because of the emergency conditions an employee is required to work for 7 consecutive days in any regularly scheduled work week a premium wage of double time compensation shall be paid for work on the 7th day."

It has generally been concluded by the courts, with very few exceptions (see *Mochl* v. *du Pont*, 12 Labor Cases, No. 63545), that Executive Order 9240 standing alone was directive, only, and did not create a cause of action in the employee.

The courts however have been just as consistent in their conclusions that where the employer agreed in his contract to comply with the rules, regulations and ordinances of the United States, that the employee as a third party beneficiary could enforce said contract and collect a 100% premium wage for the work performed on the 7th consecutive work day in any regularly scheduled work week.

Referring to the photostatic copy of the payroll record appearing on pages 137-1/3 to 137-5/3 of the transcript we see that the plaintiff worked 7 consecutive days in the weeks beginning 7-23-44; 8-13-44; 8-27-44; 9-10-44; 12-13-44; and 4-15-45.

For the time said plaintiff worked on these days for which he was not paid, he is therefore entitled to one and one-half his shift differential premium rate of pay. See *Bay Ridge Operating Co., Inc.*, v. *Aaron, et al.*, and *Huron Stevedoring Corp.*, v. *Blue, et al.*, 68 S. Ct. 1186, 334 U. S. 446, which holds that overtime must be computed on the premium rate of wages.

In the case of *Crabb* v. *Weldon Brothers*, 65 F. Supp. 369, the District Court of the United States for the Southern District of Iowa, Central Division, found that the contractor had entered into a written contract with the United States to comply with Executive Order No. 9240. The employees sued the defendant in said case, for the premium wage required by the order, and for wages and penalties under the Fair Labor Standards Act. Jurisdiction was alleged to exist by reason of the Fair Labor Standards Act. The case was filed originally in the Federal Court. The trial court first found that it had jurisdiction (this finding was later reversed on appeal), and then determined that

the employees could enforce the provisions of the contract as to Executive Order No. 9240:

> "Here then is a contract between the Government and the defendant in this action that the latter in the construction of the project would pay its employees in accordance with Executive Order No. 9240 * * *."

The court then added:

> "The prevailing doctrine in the United States is generally that a third person may sue to enforce a binding contract or promise made for his benefit, although he is a stranger to both the contract and the consideration therefor. 17 C. J. (2d), 'Contracts,' Section 519 (c), p. 1121. The Claim of plaintiffs therefore presents a litigable right."

As stated above this case was later reversed by the Eighth Circuit Court of Appeals on the grounds of lack of jurisdiction. The lower court held that a cause of action existed under the Fair Labor Standards Act which gave jurisdiction, and having acquired jurisdiction the court could proceed to determine all issues, even those which it could not have originally, separately considered. The Circuit Court of Appeals for the Eighth Circuit held there was no claim under the Fair Labor Standards Act, so, therefore, no jurisdiction ever attached, so the rights under the contract could not be determined in the Federal Courts. See *Crabb* v. *Weldon Bros.*, 164 F. (2d) 797, wherein the court said:

> "A cause of action arising from the provisions of Executive Order No. 9240, is a cause of action distinct from one based on the Fair Labor Standards Act, and it does not involve a Federal question, *since it is based on a third party beneficiary contract*, and not on a law of the United States. Such cause of action may be joined with one existing under the Fair Labor Standards Act, but if the latter is not sustained, a Federal Court is without jurisdiction to decide the cause of ac-

tion arising from Executive Order No. 9240, in the absence of diversity of citizenship and the requisite jurisdictional amount." (Emphasis ours.)

The statutes of the State of Oklahoma expressly provide such an action:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."
>
> —O. S. 1941, Title 15, Sec. 29.

This statute has been approved and sustained in many cases. (See cases digested under Contracts, Key No. 167.)

In the case of *Glenn M. Young* v. *Kellox Corporation, et al.*, 14 Labor Cases, No. 64244, the United States District Court for the Eastern District of the State of Tennessee, had a similar question before it. This opinion follows the general rule:

> "The order did not of itself confer upon war workers any rights which could be enforced in courts. However such rights arose in favor of war workers as third party beneficiaries where the provisions of the order were incorporated in the contract consummated between the Government and the contractor by whom the workers were employed.
>
> "If the contract between the Government and the contractor incorporated the wage provisions of the order, then the employee of the contractor, if he otherwise qualifies, becomes a beneficiary of the contract, and as a third party beneficiary, has a litigable right."

A well written and carefully considered opinion on the question of the right of employees to enforce a contract regarding their wages is the case of *Stover* v. *Winston Bros. Co.*, (Wash.) 55 P. (2d) 821. The City of Seattle, Washington, entered into a written contract for the construction of the Diablo Dam. The contract provided that the contractor would pay certain wages, which were the wages required

by the Ordinances of the City of Seattle. The contractor failed to pay the wages required by the contract, but paid a lesser amount. After the dam was finished many of the employees assigned their claims to one Stover, who sued for the difference between what the contract required to be paid, and what was actually paid. Judgment was in favor of the plaintiff for approximately $70,000 and the defendant appealed. The reported opinion is long, so will not be copied in full herein. In the trial of the case, and on appeal, the defendant attempted to say that the contract was void in the particulars relied upon by the employees. The court said:

> "Where contract for construction of dam for city fixed wage scale and working conditions, after work has been completed and paid for and contractor had obtained all benefits from contract, he was estopped from asserting that city lacked authority to insert provisions regarding wages."

The contractor also insisted that his constitutional right to freely contract on the matter of wages had been impaired. The court denied this plea, stating that he had voluntarily entered into the contract, and his constitutional right to freely contract was exercised when he entered into the contract with the City of Seattle. The contractor also insisted that the employee had no right to sue on the contract. This too was overruled, the court holding that the provision as to wages contained in the contract had been made for the use and benefit of the employees, and as third party beneficiaries they could enforce it.

Defendant has heretofore erroneously contended that the employees were only "incidental beneficiaries." They fail to realize that the inclusion of the provision in the contract was for the direct benefit of the employees. The employees received the premium wage. There was no intervening third party. The employee meets the test laid down in the authorities, because the employee was:

> "* * * the party intended to be benefited."

Now probably the merchant, the tailor, the landlord and other creditors of the employees would have been incidentally benefited by reason of the employee receiving more money, but the employee alone was directly benefited. All of the premium wage went directly to him.

The contract provision as to time and one-half for all over 8 hours' work relied upon by the plaintiff, was placed in said contract because of the requirement of the Eight-Hour Law. The Eight-Hour Law does not make any provision for collecting wages due under the law and neither does Executive Order No. 9240. It is therefore obvious that such rights can be enforced only in the courts.

The employees alone benefit from the provision of the contract requiring the payment of time and one-half for all over eight hours worked in any one day, and double time for the 7th straight day. The United States is protected by virtue of the fines, and other penalties provided, as well as performance bonds filed by the contractors. It is not necessary to insert the provision in the contract in order to obtain the assent of the defendant to be bound by the law. The defendant is bound by the law whether it is included in the contract or not. Only the laborers and mechanics benefit by reason of the inclusion, for, included in the contract, they have a right to enforce the provision benefiting them.

It would indeed be an empty gesture to a working man to tell him to rejoice that the government was interested in his welfare, and required that the contractor agree to pay him certain wages, and even though he didn't get the wages and he and his family went hungry, he could be assured that the contractor had violated his contract. That the law denied him the right to enforce the contract, but he would always know that he should have been paid the extra money. We don't believe that is the law.

PROPOSITION FIVE.

The Portal-to-Portal Act does not apply in this case, and is no bar to plaintiff's action.

To begin with, we must realize that this is an action based upon the Eight-Hour Law, and upon a contract to abide by the provisions of the Eight-Hour Law, and of Executive Order No. 9240. In the original action in the United States District Court for the Northern District of the State of Oklahoma, in paragraph 7 of the Fourth Cause of Action (R. 36), made a part of the petition herein by amendment (R. 19), the plaintiff specifically disclaimed any wages based upon or growing out of the Fair Labor Standards Act, Walsh-Healey Act, or Bacon-Davis Act. In this action plaintiff seeks only relief under the Eight-Hour Law, and contract to abide by that law and to abide by Executive Order No. 9240. No penalty, or attorney's fees, or any other rights under the Fair Labor Standards Act are sought in this action. No place in the petition herein is there any reference to "interstate commerce" or any other activity that would bring this employment under the provisions of the Fair Labor Standards Act.

The Portal-to-Portal Act (see Appendix, p. 54) does not mention the Eight-Hour Law. It prohibits the bringing of actions for portal-to-portal claims except under certain conditions in actions arising under the Fair Labor Standards Act, the Bacon-Davis Act, and the Walsh-Healey Act. By naming these specific acts it must be presumed that laws not mentioned were not intended to be covered.

> *Expressio Unius Est Exclusio Alterius.* "Where a statute enumerates the things upon which it is to operate, * * * or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned."
>
> —59 C. J. 984.

"It is a general principle of interpretation that the

mention of one thing implies the exclusion of another thing."

—25 R. C. L., p. 981.

We are not justified in assuming that it was the intention of Congress to amend the Eight-Hour Law when that law was not mentioned. Amendments by implication are not favored by the courts.

—*Harding* v. *Mutual Ben. Health & Accident Ass'n*, 39 P. (2d) 306, 55 Idaho 131;

State v. *Board of Com'rs of Cascade County*, 296 Pac. 1, 89 Mont. 37;

Generaux v. *Petit*, 19 P. (2d) 911, 171 Wash. 132;

Nelson v. *Nelson*, 209 Pac. 810, 72 Colo. 20;

United States v. *Madigan*, 57 S. Ct. 566, 300 U. S. 500, 81 L. ed. 767;

Prott's Estate v. *C. I. R.*, 125 F. (2d) 591.

In the only cases petitioner has been able to find where the question of applying the Portal-to-Portal Act to suits under the Eight-Hour Law is involved the courts have clearly held that causes of action under the Eight-Hour Law are not subject to the Portal-to-Portal Act.

—*Boggs* v. *Kershaw, Butler Engineers, Limited*, (Ala.) 40 So. (2d) 320;

Finnan v. *Elmhurst Contracting Company*, (N. Y. S.) 199 Misc. 1016.

In the *Finnan* case, *supra*, the court said:

"The defense thus pleaded applies only to plaintiff's first cause of action based on the Fair Labor Standards Act, and is of no merit in the second cause of action based on the Eight-Hour Law."

Conclusion.

It is the contention of the petitioner that the Supreme Court of the State of Oklahoma could not pass on the questions involved in this lawsuit without rendering decisions on federal statutes and orders. The questions involved are substantial and probably are contrary to what this Court would hold.

It is obvious that the activity sued for constituted work as that term is used in federal legislation and that both under the Eight-Hour Law and under the contract to abide by all federal laws, the plaintiff has a right to collect his unpaid wages.

Petitioner insists that the holding of the Supreme Court of the State of Oklahoma, that the Eight-Hour Law and the Fair Labor Standards Act are one and the same as far as the Portal-to-Portal Act is concerned is clearly erroneous and wrongfully denies to the petitioner, rights, privileges, and immunities guaranteed to him under the Constitution and Statutes of the United States.

These things being true it is the contention of the petitioner that the Writ of Certiorari should be granted and the judgment of the Supreme Court of the State of Oklahoma should be reversed and that this petitioner should be granted the relief to which he is entitled.

Respectfully submitted,

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APPENDIX.

SECTIONS 324 AND 325A OF TITLE 40 OF U. S. C.

Sec. 324. *"Public Contracts to Provide for Eight-Hour Day; Stipulation for Penalty; Inspectors to Report Violations; Deduction of Penalty; Appeals; Right of Action in Court of Claims.* Every contract made to which the United States, any territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; * * *" (p. 317).

Sec. 325-A. *"Same; Computation of Wages on Basic Day Rate of Eight Hours; Work in Excess of Day Rate.* Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in Sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. Sept. 9, 1940, 9 a. m. E.S.T., c. 717, Title III 303, 54 Stat. 884."

"EXECUTIVE ORDER 9240.

Regulations Relating to Overtime Wage Compensation.

Whereas, many labor organizations have already adopted the patriotic policy of waiving double time compensation or other premium pay for work on Saturday, Sunday and holidays, as such, for the duration of the war, and

Whereas it is desirable and necessary in the prosecution of the war, and to insure uniformity and fair treatment for those labor organizations, employers, and employees who are conforming to such wage policies that this principle be universally adopted:

Now Therefore, by virtue of the authority vested in me by the Constitution and the statutes, as President of the United States and as Commander in Chief of the Army and Navy, it is hereby ordered:

1. That the following principles and regulations shall apply for the duration of the war to the payment of premium and overtime wage compensation on all work relating to the prosecution of the war:

A. • • • • • • • •

(1) Where because of emergency conditions an employee is required to work for seven consecutive days in any regularly scheduled work week a premium wage of double time compensation shall be paid for work on the seventh day.

(2) • • •

B. • • • • • • • •"

PARTS I AND II OF THE PORTAL-TO-PORTAL ACT OF 1947.

An Act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

PART I.

Findings and Policy.

Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established cus-

toms, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse

effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several states, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound, and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

PART II—EXISTING CLAIMS.

Relief From Certain Existing Claims Under the Fair Labor Standards Act of 1938, As Amended, the Walsh-Healey Act, and the Bacon-Davis Act.

SEC. 2 (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either——

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minmum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an

employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 347

D. E. MILLER, PETITIONER

v.

E. I. DU PONT DE NEMOURS AND COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for Mayes County, State of Oklahoma (R. 40–41) is unreported. The opinion of the Supreme Court of Oklahoma (R. 44–57) is reported at 244 P. 2d 810.

JURISDICTION

The judgment of the Supreme Court of Oklahoma was entered on April 1, 1952 (R. 45). A petition for a rehearing was denied on May 27, 1952 (R. 58). On August 9, 1951, Mr. Justice Reed extended the time within which to file a petition for certiorari to September 20, 1952 (R. 11)

59). On September 13, 1952, the time was further extended by Mr. Justice Burton to September 30, 1952. The petition for certiorari was filed on September 22, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the Eight Hour Law is applicable to an employee working under a public contract for the manufacture of explosives when, as required by law, the contract expressly makes his employment subject to the provisions of the Walsh-Healey Act.

2. Whether, assuming the applicability of the Eight Hour Law, either that law or Executive Order 9240 permits the employee to recover a judgment from his employer for overtime compensation for activities which come within the scope of the Portal-to-Portal Act.

3. Whether the employee can recover such a judgment for such activities on the theory that he is a third party beneficiary of contract provisions requiring the contractor to comply with applicable laws of the United States.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Walsh-Healey Act, 49 Stat. 2036, as amended, 56 Stat. 277, 41 U. S. C. 35, *et seq.*; the Eight Hour Law, 27 Stat. 340, as amended, 37 Stat. 137, 726, 54 Stat. 676, 884, 40 U. S. C. 321–326; the Portal-to-Portal Pay Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251

et seq.; and Executive Order No. 9240, 7 F. R. 7159, as amended by 7 F. R. 7419, terminated 10 F. R. 10275, are set forth in Appendix A, *infra*, pp. 19–34.

STATEMENT

On September 11, 1941, respondent entered into a cost-plus-a-fixed-fee contract with the United States[1] whereby respondent was to construct, equip, and, at the option of the Government,[2] operate an ordnance plant near Choteau, Oklahoma, for the manufacture of explosives.[3] Each phase of respondent's performance was the subject of a separate and distinct set of provisions. The portions of the contract covering the construction and equipping of the facility each carried stipulations (Articles I–F (2) and II–D, Appendix B, pp. 35–36, *infra*) that respondent would comply with the provision of the Eight Hour Law (40 U. S. C. 321 *et seq.*) concerning premium compen-

[1] Since the United States is or may be obligated to reimburse respondent for money paid in resisting or settling claims arising out of work performed under the contract, defense of this action was undertaken by the Department of Justice at the request of the Department of the Army, successor to the War Department which was the contracting agency.

[2] The option was exercised.

[3] Some of the relevant sections of the contract were omitted from the printed record. Pursuant to a stipulation between counsel for the United States and counsel for petitioner, which permits reference to any part of the transcript filed in this Court, we have set forth these sections in Appendix B, *infra*, pp. 35–37.

sation for work in excess of eight hours in one day (40 U. S. C. 325a). The portions covering the operational phase contained respondent's agreement (Article IV–D, Appendix B, p. 36, *infra*), to abide by the provisions of Section 1 of the Walsh-Healey Act (41 U. S. C. 35). In addition, respondent agreed, in its overall performance of the contract, to "obey and abide by all applicable laws, regulations and ordinances and other rules of the United States" (Article VII–F (2), Appendix B, p. 37, *infra*).

On December 12, 1945, 21 operational employees filed an action against respondent in the District Court of Mayes County, Oklahoma, on behalf of themselves and more than 25,000 other employees similarly situated. (R. 8.) Their complaint alleged in substance that they were entitled to overtime compensation under the Fair Labor Standards Act (29 U. S. C. 201 *et seq.*) for time spent on respondent's premises in traveling to and preparing for production activity. (R. 9–11.)[4] The

[4] Plaintiffs claimed that after checking in and before checking out they were required to travel considerable distances to and from the immediate area of their employment and were further required by the nature of respondent's business to change clothing and bathe with a chemical preparation. The time spent in this activity was not included by respondent in computing the number of hours an employee worked. It is apparent that these factual contentions were patterned after those advanced in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, where this Court held the Fair Labor Standards Act applicable to similar nonproductive activity.

suit was subsequently removed to the United States District Court for the Northern District of Oklahoma and on May 3, 1946, the present petitioner, a former operational employee of respondent, intervened (R. 11).

On May 14, 1947, the Portal-to-Portal Pay Act (29 U. S. C., Supp. V, 251 *et seq.*) was enacted, specifically relieving employers from liability for certain existing and future pay claims under the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act (40 U. S. C. 276a *et seq.*), except where the activity was compensable under a contract, custom, or practice, in effect at the time of its performance between employer and employee. The Portal Act was immediately challenged on constitutional grounds by plaintiffs in this action (denominated the *Willis* suit) and four companion actions pending in the United States District Court for the Northern District of Oklahoma. The *Willis* suit and three of the others were held in abeyance until the District Court upheld the constitutionality of the Act on September 24, 1947, *Adkins* v. *du Pont de Nemours & Co.*, No. 1816.[1] Soon thereafter, respondent moved to dismiss the *Willis* suit and its companion actions. Plaintiffs filed a response in which, admitting that Federal jurisdiction had been extinguished by virtue of the Portal Act, they moved that the case be

[1] The United States Court of Appeals for the 10th Circuit affirmed. *Adkins* v. *du Pont de Nemours & Co.*, 176 F. 2d 661. This Court denied certiorari, 339 U. S. 935.

remanded to the state court for a determination of their claims on other grounds. On October 14, 1948, the motion to remand was overruled and the action was dismissed. However, permission was granted to plaintiffs to amend their complaint in order to bring themselves, if possible, within the exception to the coverage of the Portal Act. On November 13, 1948, the plaintiffs amended the complaint to assert causes of action arising out of the Eight Hour Law, *infra*, pp. 22–27 (40 U. S. C. 321 *et seq.*) and Executive Order 9240, *infra*, p. 34 (R. 19–38).

The federal court, after a hearing on March 30, 1949, dismissed the amended complaint for want of jurisdiction (R. 38–39). The plaintiffs immediately refiled their suits on an individual basis in the state court (R. 3–6), petitioner's action being designated as the "pilot case" for the purpose of testing the sufficiency of the allegations in respect to the Eight Hour Law and Executive Order 9240. Respondent demurred to his petition (R. 40) and, on August 15, 1950, the District Court sustained the demurrer and dismissed the petition with prejudice (R. 40–41). The Supreme Court of Oklahoma affirmed the dismissal (R. 44–57).

ARGUMENT

Petitioner here seeks to use the Eight Hour Law as a basis for recovering overtime compensation for "travel and preparation" (R. 5) between the front gate of the company's plant and his place of productive work. A like claim for overtime under the Fair Labor Standards Act was dismissed on the ground that the Portal-to-Portal Act expressly precluded recovery for such activities. Petitioner does not, and could not, make any claim that the activities here in suit come within the exceptions to the Portal-to-Portal Act.* His contention is that the Eight Hour Law is applicable and affords to an employee a right to recover overtime compensation for activities which come within the ban of the Portal-to-Portal Act. We submit that the Oklahoma Supreme Court properly rejected that contention, and that its decision presents no issue calling for review by this Court.

1. Petitioner's employment was not covered by the Eight Hour Law since he was employed solely in connection with the *operation* of the ordnance facility. The provisions of the Eight Hour Law

*Any such claim would be precluded by principles of collateral estoppel. In dismissing the federal action, the district court found that the amended complaint "does not state a claim or cause of action under the Fair Labor Standards Act, as amended" (R. 39). It further found expressly that the amended complaint does not state a claim for compensation founded on contract or custom, *i. e.*, that it does not come within the exceptions permitted by Section 2 of the Portal-to-Portal Act (*ibid.*)

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were incorporated in the *construction* and *plant equipment* phases of the contract (Arts. I–F, II–D, *infra*, pp. 35–36) but were not embodied in the *operational phase*. Instead, respondent agreed to comply, in *operating* the facility, with the provisions of the Walsh-Healey Act, which must be included in all Government contracts for the manufacture or furnishing of materials, supplies, articles, or equipment in any amount in excess of ten thousand dollars. (Art. IV–D, *infra*, p. 36).

These provisions of the contract reflect the consistent administrative view of the relationship of the two acts. The Eight Hour Law, originally enacted in 1868 and amended in 1892, 1912, 1913, and 1940 (15 Stat. 77, 27 Stat. 340, 37 Stat. 137, 726 54 Stat. 676, 884) applies in its present form to all "laborers and mechanics" employed by the United States, or by any contractor or subcontractor "upon a public work of the United States" or "in connection with dredging or rock excavation in any river or harbor of the United States" (40 U. S. C. 321). Service of such employees is limited to eight hours a day (*id.*). Contracts with the United States are required to contain stipulations to that effect (40 U. S. C. 324), but contracts, *inter alia*, "for the purchase of supplies by the Government" are excepted from that requirement (40 U. S. C. 325). By the 1940 amendments, work in excess of eight hours was permitted on payment of time and one-half of overtime (40 U. S. C. 325a).

The Walsh-Healey Act, enacted in 1936, applies to "any contract" by the United States "for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000" (41 U. S. C. 35). It requires such contracts to contain a number of stipulations, all of which were incorporated in the operational phase of the present contracts. One of these provisions, governing maximum hours (41 U. S. C. 35 (c)), is very similar to the mandate of the Eight Hour Law. In addition, however, the Walsh-Healey Act imposes conditions upon the contractor in the nature of prescribed minimum wages, restrictions in the use of child and convict labor, and safety requirements (41 U. S. C. 35 (b) (d) (e)), and provides procedures for the recovery by employees of the amounts of any underpayment of wages (41 U. S. C. 36).

Thus by their terms the Walsh-Healey Act was applicable and the Eight Hour Law was not applicable to the operational phase of the contract in suit. That phase of the contract, which was optional with the contractor and clearly separable from the construction and plant equipment phases, called for the contractor to manufacture explosives and supply them to the United States. It thus was clearly a contract "for the manufacture or furnishing of materials" within the Walsh-Healey Act, and would appear to be a contract "for the purchase of supplies" which is excepted

from the Eight Hour Law. Moreover even if it might otherwise come within the Eight Hour Law, it has been the consistent administrative view that to the extent that the two statutes may overlap, the Walsh-Healey Act must be deemed to have superseded the Eight Hour Law.

The Comptroller General has ruled that where the provisions of the Walsh-Healey Act are clearly applicable to the complete performance of a contract, the provisions of the Eight Hour Law should not be included in the contract even though that law would have been applicable but for the enactment of the Walsh-Healey Act. 19 Comp. Gen. 267 (1939). This decision followed his recognition that as a general proposition the two Acts relate to different classes of contracts: the Eight Hour Law to contracts dealing with the construction and repair of public buildings and the Walsh-Healey Act to contracts dealing with the manufacturing or furnishing of supplies and articles. *Ibid.* at p. 268. This ruling has been reflected in applicable regulations of the War and Labor Departments.[1] Inasmuch as the Walsh-

[1] See War Department Procurement Regulations, Sept. 5, 1942, as amended, 10 C. F. R. 81.905 (a): "The [Eight Hour] law does not ordinarily apply to supply contracts, such contracts ordinarily being subject to the Walsh-Healey Act where the amount involved is in excess of $10,000.00"; Labor Department, Supplement to Rulings and Interpretations No. 2, issued January 24, 1944, par. 6, 1944 Wage and Hour Manual p. 1120, carried forward into Rulings and Interpre-

Healey Act includes the substance of the Eight Hour Law's provisions relating to overtime, there is no necessity to apply the latter statute to public contracts for the manufacturing or furnishing of goods.[8] It should be noted in this connection that the post-1935 cases under the Eight Hour Law, cited by petitioner in his brief, did not involve

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tations No. 3, Oct. 1, 1945, Sec. 21 (c), 1947 Wage and Hour Manual p. 344:

"(c) Where the fields of application of the [Walsh-Healey] Public Contracts Act and the so-called Eight-Hour Law (37 Stat. 137, 40 U. S. C. 324–325) overlap and the provisions of the Public Contracts Act are clearly applicable to complete performance of the contract, the provisions of the Eight-Hour Law should not be included in the contract (19 Comp. Gen. 267). Wherever the two Acts overlap, the provisions of the Public Contracts Act take precedence over those of the Eight-Hour Law."

[8] This conclusion is in no sense inconsistent with this Court's holding in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497. That case involved the question whether activities under Government contracts covered by the Walsh-Healey Act should be excluded from the coverage of the later-enacted Fair Labor Standards Act. The Court's decision rested on its view of the broad coverage intended in the latter Act, and was supported by a variety of factors including the views of the Labor Department. The question whether employees of government contractors are to be excluded from general labor legislation is, of course, quite different from the question of which of two acts, both relating solely to government employees and employees of government contractors, is to be deemed controlling.

employees engaged in activities protected by the Walsh-Healey Act.*

Since petitioner's employment was governed by the Walsh-Healey Act, his claim is barred by the express terms of the Portal-to-Portal Pay Act of 1947. Sections 2 and 4 of that Act apply equally to claims under the Fair Labor Standards Act, the Walsh-Healey Act and the Bacon-Davis Act.

2. Assuming *arguendo* that the Eight Hour Law and the Walsh-Healey Act are both applicable to petitioner's employment, his position is not thereby improved. It is true that the Portal Act makes no specific reference to the Eight Hour Law. The explanation, however, does not lie in a strange belief that employees covered by the Eight Hour Law should obtain the windfall that the Portal Act denies to other public contract employees. On the contrary, the Portal Act clearly was intended to prevent the use of any federal wage and hour legislation to support pay claims based on the activities with which that Act deals.

The Portal-to-Portal Act resulted from this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, which interpreted the Fair Labor Standards Act as requiring compen-

* *Fillardo* v. *Foley Bros.*, 297 N. Y. 217, 78 N. E. 2d 480 (March 11, 1948), reversed, 336 U. S. 281; *Boggs* v. *Kershaw, Butler Engineers, Ltd.*, 252 Ala. 265, 40 So. 2d 390 (April 14, 1949); *Finnan* v. *Elmhurst Contracting Co.*, 199 Misc. (N. Y.) 1016, 107 N. Y. S. 2d 497 (December 11, 1950); *Veader* v. *Bay State Dredging and Contracting Co.*, 79 F. Supp. 837 (D. Mass.) (June 24, 1948).

sation for portal-to-portal activity "regardless of contrary custom or contract" (328 U. S. at 692).[10] In Section 1 of the Portal Act (29 U. S. C., Supp. V, 251), Congress declared, *inter adia,* that judicial interpretations of the Fair Labor Standards Act, made in disregard of established customs, practices, and contracts, created wholly unexpected liabilities on employers, gave a windfall to employees, interfered with collective bargaining, and increased the cost to the United States Government of government purchases and war contracts. Congress further found that like consequences would ensue in respect of claims under the Walsh-Healey and Bacon-Davis Acts. The intent of Congress was to "outlaw claims for make-ready time in portal-to-portal suits" (93 Cong. Rec. 1485—Representative Allen, Chairman of the Rules Committee). Congress evidently thought that it was precluding such claims, and preventing the evils which it found to be attendant on them, wherever they might arise under federal legislation concerning hours of work in activities related to interstate commerce or under Government contracts.

To allow recovery under the Eight Hour Law for activities within the ban of the Portal Act would defeat the purpose of the latter Act. If petitioner's employment comes under the Eight Hour

[10] The committee reports referred also to *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local 123, et al.*, 321 U. S. 590, and *Jewell Ridge Coal Corp.* v. *Local No. 6167, UMW*, 325 U. S. 161.

Law, so does the employment of all laborers and mechanics working under the terms of any Government contract within the coverage of the Walsh-Healey Act. Hence if petitioner can invoke the Eight Hour Law to give status to a pay claim within the ban of the Portal Act, so can these other employees. This would render wholly nugatory the prohibition against instituting such claims under the Walsh-Healey Act, since every worker subject to that prohibition could, if petitioner were to prevail, circumvent it by placing reliance on the Eight Hour Law instead. Nothing in the Eight Hour Law requires that such a loop-hole in the Portal Act be created. On the contrary, since the Eight Hour Law has never been construed as allowing recovery for portal-to-portal activities, there would be every reason now to construe it in a manner which would give effect to the policy of the Portal Act, and would render it consistent with other statutes *in pari materia*."

The omission, in the Portal Act, of any reference to the Eight Hour Law is apparently attrib-

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[11] Although petitioner cites *Boggs* v. *Kershaw Butler Engineers, Ltd.* and *Finnan* v. *Elmhurst Contracting Co.*, both *supra*, n. 9, as holding that causes of action under the Eight Hour Law are not subject to the Portal Act (Pet. p. 51), the opinion in neither case makes any reference to the Portal-to-Portal Act, or discloses facts indicating that portal-to-portal activities were involved. So far as we can determine, there have been no decisions since the passage to the Portal-to-Portal Act that have granted compensation for portal-to-portal activities under any federal statute or regulation.

utable to a lack of awareness by Congress of the possibility that portal claims might be made under that Act. Such a lack of awareness is wholly understandable. In each of the three statutes which are referred to in the Portal Act—the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act—Congress had made explicit provision for suits by the employee, or by the United States for his benefit, to recover overtime compensation.[12] The Eight Hour Law contains no such provision. Prior to the 1940 amendments to it, that law had been repeatedly construed as conferring no right on the employee to recover overtime compensation.[13] And the recent decisions permitting such recovery, on the ground

[12] Section 16 (b) of the Fair Labor Standards Act, 29 U. S. C., Supp. V, 216 (b) enables the employee to bring suit himself for unpaid overtime compensation. Section 2 of the Walsh-Healey Act, 41 U. S. C. 36, provides that the Government may withhold monies due on contracts or recover for underpayments of wages through an action brought by the Attorney General in the name of the United States. The funds obtained in this manner are to be paid over to the employees concerned on order of the Secretary of Labor. The Bacon-Davis Act, which concerns rates of pay for workers employed under contracts for the construction, alteration, and repair of public buildings and public works, provides in Section 3 (40 U. S. C. 276a–2), a basically similar remedy, except that, when the withheld sums prove insufficient to render full compensation, the employee has a direct right of action against the contractor.

[13] *United States* v. *Martin*, 94 U. S. 400; *Timmonds* v. *United States*, 84 Fed. 933 (C. A. 7); *United States* v. *Moses*, 126 Fed. 58 (C. A. 9), certiorari denied, 195 U. S. 632; *Coleman* v. *United States*, 81 Fed. 894 (D. Ky.); see *Swisher* v. *United States*, 57 C. Cls. 128.

that the 1940 amendments to the law changed its effect in that regard, were rendered subsequent to the enactment of the Portal Act."

For the foregoing reasons, the Eight Hour Law, even if it should be assumed (contrary to point 1 above) to be applicable, and further assumed to create a right of action in favor of the employee, would not sustain recovery by petitioner. Hence there is no occasion here to consider the question, presented but not decided in *Foley* v. *Filardo Bros.*, 336 U. S. 281, 290–291, whether that law under any circumstances gives an employee a cause of action against his employer for overtime wages.

3. Petitioner's reliance upon Executive Order 9240 is equally misplaced. Its text (Appendix A, *infra*, p. 34) plainly shows that it was meant to be nothing more than a policy directive by the executive to his agents to the effect that when an employee on a war project worked seven consecutive days in a regularly scheduled work week he was to receive double time compensation for the seventh day.[14] The Order does not suggest any intention to confer a right of action on the employee, even assuming that such a right could

[14] See footnote 9, *supra*.

[15] The President had found that, as a patriotic gesture, many labor organizations had waived premium pay compensation for week-end and holiday work. Regarding it necessary to insure "uniformity and fair treatment" for unions, employers, and employees conforming to this policy, he issued the Order. At the conclusion of World War II the operation of Executive Order 9240 was terminated by Executive Order 9601, dated August 21, 1945. 10 F. R. 10275.

be conferred by Executive Order. To construe the Order as creating rights to pay for activities within the ban of the Portal Act would, for the duration of World War II, almost wholly wipe out the effect of the Portal Act as applied to Government contracts, for the Order in terms applies to "all work relating to the prosecution of the war."

4. As has been demonstrated, neither the Walsh-Healey Act, the Eight Hour Law, nor Executive Order 9240 supports petitioner's claim. Consequently, his third-party beneficiary theory of recovery must, of necessity, fail. Petitioner's position is that the wage provisions inserted in respondent's contract with the United States were for his benefit and therefore may be enforced by him. However, these provisions consisted merely of respondent's agreement to comply with the Walsh-Healey Act and all other applicable laws, regulations, and ordinances of the United States. The terms of the Walsh-Healey Act, as amended by the Portal Act, have been complied with. The Eight Hour Law is not applicable. But even if it were, neither it nor Executive Order 9240 confers upon the employee a right of action to recover compensation for activities within the ban of the Portal Act. Consequently, none of the contractual provisions of which petitioner is supposedly the beneficiary contemplates such a right of action. It follows that petitioner cannot demonstrate, as he must in order to meet the requirements of a third-party bene-

ficiary, that the contracting parties intended to convey a direct benefit upon him. *Cf. German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 230.[16] To allow recovery, on the theory of a third-party beneficiary, of compensation for activities for which the Acts of Congress do not authorize or contemplate recovery would be to permit easy evasion of the policy of the Portal Act.[17]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1952.

[16] The question of petitioner's status as a third-party beneficiary is one of federal and not state law, as it involves the construction of respondent's contract with the United States. *Caldarola* v. *Eckert*, 332 U. S. 155, 158.

[17] The courts have uniformly rejected attempts to recover portal compensation on a third-party beneficiary theory. *Fisch* v. *General Motors Corporation*, 169 F. 2d 266 (C. A. 6), certiorari denied, 335 U. S. 902; *Thomas* v. *Carnegie-Illinois Steel Corp.*, 174 F. 2d 711 (C. A. 3); *Adkins* v. *E. I. du Pont de Nemours & Co.*, 176 F. 2d 661 (C. A. 10), certiorari denied, 339 U. S. 935.

APPENDIX A

1. The pertinent provisions of the Walsh-Healey Act, 49 Stat. 2036, as amended, 56 Stat. 277, 41 U. S. C. 35 *et seq.*, are as follows:

> [SEC. 1.] * * * In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
>
> (a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;
>
> (b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently

operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: *Provided*, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled "Fair Labor Standards Act of 1938;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than

minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

2. The pertinent provisions of the Eight Hour Law, 40 U. S. C. 321 *et seq.,* are as follows:

§ 321. *Eight-hour day on public works; river and harbor dredging; longer hours unlawful.*

The service and employment of all laborers and mechanics who are or may be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are or may be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or

rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this section and section 322 of this title, shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock-excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States. (Aug. 1, 1892, ch. 352, § 1, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

§ 322. *Violation of act punishable.*

Any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of section 321 of this title, shall be deemed guilty of a misdemeanor, and for each and

every such offense shall, upon conviction, be punished by a fine not to exceed $1,000, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. (Aug. 1, 1892, ch. 352, § 2, 27 Stat. 340; Mar. 3, 1913, ch. 106, 37 Stat. 726.)

* * * * *

§ 324. *Public contracts to provide for eight-hour day; stipulation for penalty; inspectors to report violations; deduction of penalty; appeals; right of action in Court of Claims.*

Every contract made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of $5 for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Terri-

tory, or of the District of Columbia, all violations of the provisions of this section directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. (June 19, 1912, ch. 174, § 1, 37 Stat. 137.)

§ 325. *Same; contracts excepted; work included; waiver in time of war; when penalty not to be imposed; eight-hour law not affected.*

Nothing in section 324 of this title shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided,* That all classes of work which have been, or may be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section 324 of this title. The President, by Executive Order, may waive the provisions and stipulations in this section and section 324 of this title as to any specific contract or contracts during time of war or at a time when war is imminent. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing

in this section or section 324 of this title shall be construed to repeal or modify sections 321–323 of this title, or apply to contracts entered into under the provisions of appropriation Acts approved prior to June 19, 1912. (June 19, 1912, ch. 174, § 2, 37 Stat. 138.)

§ 325a. *Same; computation of wages on basic day rate of eight hours; work in excess of day rate.*

Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. (Sept. 9, 1940, 9 a. m., E. S. T., ch. 717, title III, § 303, 54 Stat. 884.)

§ 326. *Suspension of eight-hour law in case of emergency; overtime pay.*

In case of national emergency the President is authorized to suspend provisions of law prohibiting more than eight hours labor in any one day of persons engaged upon work covered by contracts with the United States: *Provided,* That the wages of persons employed upon such contracts shall be computed on a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours worked in excess of eight hours. (Mar. 4, 1917, ch. 180, 39 Stat. 1192.)

3. The pertinent provisions of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251 *et seq.*, are as follows:

> SECTION 1. (a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the

employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

SEC. 2. Relief from certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act [May 14, 1947], except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time

of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act [May 14, 1947], to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey

Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act [May 14, 1947], or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

* * * * *

SEC. 4. Relief from certain future claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of of this Act [May 14, 1947]—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding,

traveling, or other preliminary or postliminary activities described in subsection (a), there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

4. Executive Order 9240, 7 F. R. 7159, as amended, 7 F. R. 7419, provides in pertinent part:

> Whereas many labor organizations have already adopted the patriotic policy of waiving double time compensation or other premium pay for work on Saturday, Sunday and holidays, as such, for the duration of the war, and
>
> Whereas it is desirable and necessary in the prosecution of the war, and to insure uniformity and fair treatment for those labor organizations, employers, and employees who are conforming to such wage policies that this principle be universally adopted:
>
> Now Therefore, by virtue of the authority vested in me by the Constitution and the statutes, as President of the United States and as Commander in Chief of the Army and Navy, it is hereby ordered:
>
> 1. That the following principles and regulations shall apply for the duration of the war to the payment of premium and overtime wage compensation on all work relating to the prosecution of the war:
>
> A. * * *
>
> (1) Where because of emergency conditions an employee is required to work for seven consecutive days in any regularly scheduled workweek a premium wage of double time compensation shall be paid for work on the seventh day.

APPENDIX B

Pertinent provisions of the construction and operation contract between the United States and E. I. du Pont de Nemours & Company, Wilmington, Delaware, (Contract No. W-ORD-521; DA-W-ORD-8), are as follows:

* * * * *

[fol. 143]

TITLE I

DESIGN, ENGINEERING, AND CONSTRUCTION

* * * * *

[fol. 149]

ARTICLE I-F.—*Labor*

* * * * *

[fol. 150]

(2) The Contractor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours of any one calendar day.

* * * * *

[fol. 152]

TITLE II

PROCUREMENT OF PRODUCTION EQUIPMENT

* * * * *

[fol. 153]

ARTICLE II-D.—*Eight Hour Law—Overtime Compensation:*

The Contractor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours of any one calendar day.

* * * * *

[fol. 156]

TITLE IV

OPERATION OF PLANT (OPTIONAL)

* * * * *

[fol. 159]

ARTICLE IV-D.—*Walsh-Healey Act:*

1. The following representations and stipulations pursuant to the Walsh-Healey Public Contracts Act (Act of June 30, 1936; 49 Stat. 2036; 41 USC 35–45), shall apply to the operation of the Plant under this title IV of this contract.

* * * * *

c. No person employed by the Contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the per-

formance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

* * * * *

[fol. 175]

TITLE VII

GENERAL

* * * * *

[fol. 178]

ARTICLE VII–F.—*Special Requirements:*

The Contractor hereby agrees that it will:

* * * * *

2. Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority.

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